

**SK Snavelly King Majoros O'Connor & Lee**  
**Economic and Management Consultants**

201263  
WES-4

January 11, 2001

Mr. Vernon Williams  
Secretary  
Surface Transportation Board  
1925 K St. NW  
Washington, D.C. 20423-0001

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**Office of the Secretary**

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**Via Hand Delivery**

Dear Mr. Williams:

In response to the Notice of Proposed Rulemaking (NPR) issued by the Surface Transportation Board (STB) on October 3, 2000 in Ex Parte 582 (Sub-No.1), Major Rail Consolidation Procedures, enclosed are the Rebuttal Comments of Williams Energy Services and supporting Verified Statement of Tom O'Connor.

We have provided the original and 25 copies of the filing, as well as an electronic version in WordPerfect 7.0.

We would appreciate it if your staff would date stamp the second copy of this letter for return to us. Should questions arise, please call me at (202) 371-9149.

Thank you.

Sincerely,

A handwritten signature in cursive script that reads "Tom O'Connor".

Tom O'Connor  
Vice President

Williams Energy Services

**ORIGINAL**

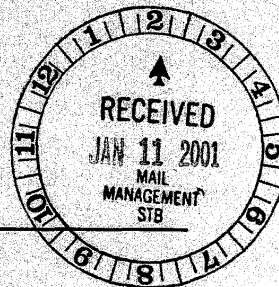
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BEFORE THE  
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582 (Sub No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

COMMENTS OF WILLIAMS ENERGY SERVICES

And

Verified Statement of

TOM O'CONNOR

Snavelly King Majoros O'Connor & Lee, Inc.  
1220 L St. NW  
Washington, DC 20005

Dated: January 11, 2001

January 11, 2001

Ex Parte No. 582 (Sub-No. 1)

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SURFACE TRANSPORTATION BOARD

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MAJOR RAIL CONSOLIDATION PROCEDURES

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COMMENTS OF WILLIAMS ENERGY SERVICES

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Williams Energy Services, by Counsel, respectfully submits these comments in response to the Surface Transportation Board's (Board or STB) Notice of Proposed Rulemaking (NPR), served October 3, 2000.

Williams Energy Services (Williams Energy Services, or Williams) is a major shipper by rail, truck, waterway and pipeline in the US and Canada. We account for more than 30,000 rail shipments annually.

Williams Energy Services is one of the largest producers in the Liquefied Petroleum Gases (LPG) industry with rail shipments representing approximately 4% of the total rail market in petroleum products<sup>1</sup>.

The LPG markets are seasonal and Williams faces periods of high demand interspersed with relatively lower levels of demand. To compete successfully in both types of markets, Williams requires responsive, reliable and economical rail service.

In the LPG industry, as in many other industries widespread competition is the norm. The key to success lies not in eliminating competition but rather in providing better value. Providing better value requires a reliable and efficient supply chain.

Through supply chain management, Williams seeks to satisfy its customers' requirements by organizing and managing cost effective flows and storage of materials, in-process inventory, products and related information in a chain spanning from point of origin to point of consumption. Rail transportation provides important links in the Williams Energy Services LPG supply chain.

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<sup>1</sup> Based on Williams LPG carload originations as percentage of rail carload originations for petroleum products (STCC 291), as compiled by AAR.

Our approach is based on Win-Win-Win. We see three winners in the Williams Energy Services Supply Chain:

- Williams Energy Services customers and suppliers
- Williams Energy Services
- Our partner railroads and other transportation companies connecting Williams Energy Services with its customers and suppliers

Our LPG supply and distribution capabilities depend on efficient and effective rail partners. We see this proceeding as a means of strengthening the Supply Chain and benefiting all of its participants.

Regrettably, at this point most of that potential remains unrealized. In the accompanying statement of Tom O'Connor, we identify the most critical areas in need of improvement and develop specific recommendations to achieve those badly needed improvements in the rail merger process.

The most important of those changes are:

- Enhanced Competition
  - Open gateways and limited open access
  - Provisions to allow challenges to bottleneck rates
- Service Assurances
- Adoption of a three phased merger review and approval process
- Greater merger implementation and oversight responsibilities for the Secretary of Transportation, assisted by an Advisory Panel reporting to the Secretary

Respectfully Submitted

Williams Energy Services, by



Charles King

ICC/STB Non-Attorney Practitioner

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**Before the Surface Transportation Board**

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**Rebuttal Comments in Response to  
Notice of Proposed Rulemaking**

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**in  
STB Ex Parte No. 582 (Sub-No. 1)  
Major Rail Consolidation Procedures**

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**Filed on Behalf of**

**WILLIAMS ENERGY SERVICES**

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**VERIFIED STATEMENT OF**

**Tom O'Connor**

**Vice President  
Snavely King Majoros O'Connor & Lee, Inc.  
1220 L St NW  
Washington DC 20005**

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## **A. Introduction**

My name is Tom O'Connor. I am Vice President of the economic and management consulting firm of Snavely King Majoros O'Connor & Lee, Inc. I have served as an economist with the Interstate Commerce Commission (ICC), the United States Railway Association (USRA), Conrail, the Association of American Railroads (AAR) and two consulting firms, including my present firm. A summary of my qualifications is attached.

Since 1998, my firm has assisted Williams Energy Services in a number of assignments related to transportation. Williams Energy Services retained my firm to review the record of this proceeding and to analyze the Surface Transportation Board's (Board or STB) present and prospective role in the impending consolidation of the railroad industry.

We have developed, in collaboration with Williams Energy Services, recommendations on rule revisions designed to retain and enhance existing rail competition while avoiding the service disruptions that have characterized recent rail mergers. Over the past eight months, working with Williams Energy Services, we have presented and supported those recommendations in four successive stages of this proceeding:

- May 16, 2000 Opening Statement, (WES-1)
- June 5, 2000 Reply Statement, (WES-2)
- November 17, 2000 Comments on the Notice of Proposed Rulemaking, (WES-3)
- This January 11, 2001 Rebuttal Statement (WES-4)

## **B. Summary**

As Williams Energy Services stated in its previous comments filed in this proceeding, the policy statements in the Notice of Proposed Rulemaking (NPR) show promise that the Board is recognizing the weaknesses of its past merger reviews. However, additional policy changes are advisable and the implementation provisions remain largely undefined.

The comments by the parties to this proceeding widely recognize the need for fundamental change in the Board's policies toward rail competition in general and rail mergers in particular.

A summary of such responses was included as Exhibit A to my November 17 Verified Statement. For ease of reference the summary of supporting filings is also included as Exhibit A to this statement.

Williams, BASF, OxyChem, OxyVinyls and many other parties to this proceeding, including railroads, shippers and governmental agencies, have called for changes including:

- **Enhanced competition**
- **Open gateways and limited open access**
- **Provisions to allow challenges to bottleneck rates**
- **Service assurances**

In addition, Williams, BASF and other parties also advocate essential changes in the following two areas:

- **Adoption of a three phased merger review and approval process**
- **Greater merger implementation and oversight responsibilities for the Secretary of Transportation, assisted by an Advisory Panel reporting to the Secretary**

Often the presentations in proceedings such as this become overheated and somewhat one-sided. However, too much is at stake to allow parochial views to prevail. Railroads, shippers and the public deserve better, and can have better.

In the remainder of this statement we summarize five areas in which change is essential to preserve and enhance the competitive strengths of both railroads and the industries they serve.

### **C. Analysis**

#### **I. The STB Should Adopt a Rebuttable Presumption that Further Class I Rail Mergers Are Contrary to the Public Interest.**

The STB, along with the vast majority of participants in this proceeding, recognizes that the next merger will begin a final round of mergers, most likely leading to two transcontinental rail systems, with the ability to impact all of North America. The stakes could not be higher.

The Board's pro-merger policy may have been appropriate in the past, when there were multiple Class I railroads, and public benefits arising from a merger were more clear. However the Board now acknowledges that the original guidelines need to be revised to meet current conditions. These conditions include far fewer Class I railroads, and dubious public benefit arising from mergers between the remaining railroads.

In its general policy statement, §1180.1, the Board states that it will not favor consolidations that reduce railroad and other transportation alternatives to shippers

unless there are substantial and demonstrable public benefits that cannot otherwise be achieved.

Due to the limited potential for public benefits arising from future mergers of Class I railroads, Williams recommends that the Board adopt the proposal of the U.S. Department of Agriculture that there be a "rebuttable presumption" that any further mergers will increase concentration and market power and reduce competition. The "rebuttable" aspect of this proposal does not close the door on further mergers, but it establishes as the threshold requirement that the applicants must demonstrate that their merger benefits the public, not just themselves.

#### **Discussion of Alternative Views**

The alternative views are somewhat sparse. For the most part even the Class I railroads are in agreement with the STB on this issue. They realize that claims made by the applicants of public benefits accruing from the proposed merger will be under increased scrutiny and will require increased proof that they can be realized. UP stated that, "This is an appropriate way to "raise the bar" for future mergers." (Reply p.20)

The major objections to this rebuttable presumption concept came from BNSF and CP. Those railroads based their arguments, in part, on the grounds that the STB now assumes there are no public benefits to be gained from future mergers. This is an erroneous assumption.

We agree with UP, that the STB has simply "raised the bar" on the burden of proof to the applicants. In past mergers some of the public benefits have been unrealistically high and unobtainable. The STB has now taken the posture of requiring the applicant to prove its claims of public benefits.

**Williams reaffirms its agreement with the Board's position of using a rebuttable presumption regarding inclusion of public benefits. If the public benefit can not be adequately supported it has no place in the decision process.**

#### **II. An Advisory Panel Should Be Established To Provide Objective Assistance In Merger Review and Implementation.**

Williams recommends that an Advisory Panel of shippers, railroads and government representatives be established to help the STB with technical analyses, oversight and other issues relating to merger applications. The Advisory Panel would report to the US Secretary of Transportation<sup>2</sup> and would assist the STB by developing objective and impartial recommendations on issues designated by the Secretary.

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<sup>2</sup> If for any reason the Secretary of Transportation chose not to lead and direct the Advisory Panel, it could report to The Department of Justice or the Federal Trade Commission, two agencies who routinely handle merger cases.

This panel must be representative and balanced to ensure objectivity and impartiality, and should include railroads and shippers, both large and small, along with government representation. The recommendations of the Advisory Panel should be binding on the STB unless subsequent compelling evidence indicated otherwise.

The Advisory Panel should focus on technical issues for which the STB resources were insufficient. Typically these issues will be relatively short term in duration but substantial in scope. Examples include review of the railroad operating plans and determinations as to whether the railroad systems have been adequately tested. The panel should also assist with any rules that deal with shipper protection, grievance procedures, and damage compensation relating to mergers.

### **Discussion of Alternative Views**

In its reply CSX noted their endorsement of an external advisory body, which they termed the "Service Council". They further elaborate on the benefits derived from the use of such an organization in the Conrail case, then called the "Transaction Council". We agree with CSX that such an organization would be of great benefit to the STB, the applicants, and all of the other parties affected by the merger process. However, experience in the Conrail case indicates more is needed. The recommended Advisory Panel meets that need.

**Williams re-affirms its request that the STB retain and enhance such an advisory organization in its revised regulations. The Advisory Panel should be a mandatory part of the process in all future mergers.**

### **III. The STB Should Segment the Merger Review Process into Three Sequential Phases.**

Williams proposes that the Board establish a three-phased procedure for evaluating and approving merger applications. Consistent with our prior comments, we recommend dividing the merger application into three manageable phases:

- 1. Corporate Merger**
- 2. Business Merger**
- 3. Operational Merger**

#### **Phase 1 - The Corporate Merger**

The primary objective of Phase I, the Corporate Merger, is to determine if there is prima facie evidence that the applicants can overcome the rebuttable presumption against further mergers. The applicants would be required to establish that the proposed merger would yield more in public benefits than it would cost in lost competition. The filing requirements for this phase would consist of financial and organizational information, along with the estimation of

the downstream effects. Generalized statements of the harm and benefits of the merger and the applicants' plans for overcoming the harms should also be submitted. While the applicants need not present a detailed plan for enhancing competition, they would be obliged to demonstrate that they have a meaningful and aggressive approach to this issue, one which has a reasonable prospect of success. If the applicants fail the preliminary test the matter is ended. The merger application is dismissed at the outset before prolonged effort by shippers, non-applicant railroads and other affected parties.

#### **Phase 2 - The Business Merger**

The majority of the filing requirements, including the operation integration plans, would fall under the second phase, the Business Merger application. The Business Merger would also include the market study identifying specific competitive harms and the determination of conditions that will resolve those harms, in addition to enhancing competition. This phase of the merger application would culminate in approval or disapproval of the merger.

#### **Phase 3 - The Operational Merger**

Working according to a schedule established in the Business Merger phase, the third, or Operational, phase would apply the testing programs, capacity measures and detailed operational changes that would be required to make the merging railroads operate as one. This pre-merger testing and step-wise integration of the applicants systems will be of utmost importance. It will serve to demonstrate that the merging railroads are indeed capable of operating as one, as the railroads will claim in their application. It will also lay to rest many of the concerns of other interested parties that they will soon be enmeshed in the same types of severe service and prolonged disruptions that have taken place in recent major mergers.

#### **Discussion of Alternative Views**

BNSF and CN opposed the concept of the three phase process proposed by Williams, BASF and others. BNSF's issues focused on (1) the clarity of distinctions between each of the three phases and (2) meeting the statutory or regulatory deadline.

BNSF feared that delays in concluding the process could have the effect of creating uncertainty in the financial markets, which are vital to the merging systems. The process proposed by Williams was characterized by BNSF as "Regulatory micro-management".

- **Comment:** The issue of clarity of distinctions is readily resolved in the STB process of administrative rulings developed by case law. The statutory deadline could easily be satisfied within the three phase process.

CP's comments on the proposed three-phased process are much the same as those expressed by BNSF. CP describes the procedure as, "...simply expanding the number

of regulatory steps required to obtain merger approval, without enhancing the ability of the STB and the public to gauge the impacts of future transactions.”

- **Comment:** There is apparently a misunderstanding by these parties as to the form and purpose of the three step process and the purpose of breaking the merger process into identifiable segments. The three phase process proposed by Williams does not contain additional review or approval steps compared to procedures contained in the STB's merger regulations, as currently proposed. The three phase process places the steps for approving a merger in logical order to achieve the greatest possible degree of confidence in its success. It was not intended to prolong the time frame for Board approval and it certainly does not expand the review or approval processes.

In light of the problems that have occurred in the most recent mergers, the Board, as are virtually all other interested parties, is primarily interested in improving the merger process and avoiding a repeat of the past disruptions. This is the primary purpose of the three phase procedure.

Two other issues relate to the merger process area. These are (1) the merger procedural time frame and (2) the provision of data on a transnational merger.

#### **Procedural time frame**

The STB's current time frame for a major transaction is one year after the primary application has been accepted. While most parties accepted this, some offered dissenting views. UP points out that under 49 U.S.C. §11325(b) the Board must issue a decision within 15 months after acceptance of an application. They further stress that this time would be required given the much larger volume and more detailed service and market data that must be reviewed in the revised process. In opposition to UP's position, BNSF suggests that the one year time frame should commence with the pre-filing notice of a merger by the applicants.

- **Comment:** Williams recognizes the increased workload that will be placed upon the STB's staff by both the increased data that will be filed and by the sheer volume of detailed data that will be associated with the transcontinental mergers contemplated as part of the end game. Williams agrees with UP's proposal to use the maximum amount of time available to the STB in this process. Williams also agrees with the UP rationale for including this time frame in the regulations.
- **Comment:** BNSF appears to be primarily concerned with reducing the time to the absolute minimum. In addition, BNSF would start the procedural time clock when the pre-filing notice of a merger is made by the applicants. This would begin the procedural time frame with no substantial data available for review and analysis. In effect, this reintroduces BNSF's original position of limiting the time frame to 9 months, a position others, including UP, labeled as unreasonable.

- **Comment:** Two issues must be considered; first the length of the overall time frame and second the milestone signaling the starting point for the time frame. Williams has previously stated that the STB has to make perfectly clear the point at which they consider the time frame for approval has begun. This milestone sets the calendar in motion.

**Provision of data by non-U.S. railroads**

- **Comment:** On the issue of the data that is to be provided by non-U.S. railroads involved in a transnational merger, even the Canadian railroads now agree that full system data should be provided.
- **Comment:** Williams continues to have a problem with the proposed regulations' failure to identify specifically the data that will be provided by non-U.S. railroads. More precisely, the data for costing purposes, statistics and accounting amounts, is not discussed in the proposed regulations. The final regulations should specify that the non-US railroads will provide the operational and cost information in a format that is comparable to that of the US railroads involved in the merger under review.

**IV. The STB Should Address Merger Related Service Failures Pre-Merger.**

Current merger policy does not address merger related service failures adequately. Even post merger oversight did not sufficiently protect shippers from massive "merger hangovers". Williams recommends that the Board insist on minimal service disruptions in future mergers. The railroads must take responsibility for their actions, testing their systems prior to merging to ensure a smooth transition, and backing up their service promises with compensation for harms resulting from the merger.

While the STB states that it will conduct extensive post-approval monitoring, this is no different than what was done in recent mergers. The STB needs to take steps before the merger to reduce the chances of a repeat of the major service problems encountered in previous mergers. Williams Energy Services showed in its filing, as did others<sup>3</sup>, simple and proven ways this can be accomplished. Comprehensive and rigorous pre-merger testing including stepwise integration of systems is the first step toward mitigating and offsetting merger harms.

Pre-merger benchmarks should be established to develop baseline service levels upon which to measure post-merger operations. CN, CP and UP made this point in their filings in this proceeding. We agree; but more is required. Not only should applicants be required to identify potential problem areas prior to the actual merger, they should be required to correct the anticipated problem. Applicants should explain how they would

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<sup>3</sup> See for example, Opening and Reply Comments by BASF, OXY and Williams Energy Services in Ex Parte 582 (Sub-No.1), filed May 16 and June 5, 2000 and NPR comments filed by BASF and Williams Energy Services on November 17, 2000.

cooperate with other carriers, in particular short-line carriers, in overcoming serious service problems. Written agreements with other railroads as to the extent of this cooperation should be submitted as part of the application.

Having been required to perform significant pre-merger integration testing, establish pre-merger service benchmarks, correct identified problems and enter into cooperative agreements with other railroads, the applicants should be able to consummate the merger with a minimal disruption to their customers. They should therefore not be reluctant to put some guarantees behind their hard work. The railroads should have no reason to fear the concept of compensation to shippers for merger related service disruptions.

Williams, along with many other shippers, has experienced severe disruptions to its operations from recent mergers, including increased costs, decreased service and lost sales. Yet there has been no recourse other than costly and time-consuming litigation in court. As a result, we recommend both short term and longer term remedies. As a short-term remedy, shippers damaged by deteriorated service and other merger problems should be compensated in monetary terms for the losses sustained. For the longer term, the only lasting remedy is restoration of service to pre merger levels.

The Board should establish rules and procedures by which shippers could receive prompt resolution of their complaints against merging railroads. The rules would prescribe procedures for the filing of complaints, establish appropriate investigative and adjudicatory entities, and set forth the basis for compensation to aggrieved shippers. Alternatively, the Advisory Panel could have a role in establishing benchmarks and compensation.

#### **Discussion of Alternative Views**

##### **Planning and Pre-Merger Benchmarks**

The issue of merger related service failures is recognized by the railroad industry as well as by shippers and other users of rail service as one of the most important aspects of the merger process, and one of the most dangerous. In their reply statements several railroads commented on this issue.

CSX stated that the Board, "...should impose rigorous planning requirements to ensure that operational integration issues are formally addressed, and should closely monitor the operational progress of integration." They further stated that the railroad is in the best position to identify service problems and it would be premature for the STB to determine every detail of operational monitoring data that should be required. Finally, CSX noted that the specific set of data proposed in §1180.1(c) is not all inclusive, and does not preclude the use of other information.

NS noted as a constructive measure the requirement to develop a service assurance plan (SAP). The SAP is intended to minimize or eliminate service disruptions and

provide a process for operational monitoring to respond to service problems that might arise. Finally, NS stated that it is essential that the Board retain flexibility in its operational monitoring requirements.

It appears that NS and others believe that developing the Service Assurance Plan (SAP) and other rigorous planning will eliminate the service failures experienced in recent mergers.

- **Comment:** Williams believes that the railroads involved in recent mergers did everything they believed necessary to operate the combined systems on a near normal basis. The planning completed by the involved railroads was extensive and included a massive effort by their personnel, and (in the case of the Conrail split) coordination with shippers through the Transaction Council. And yet the end result was service failure, despite their best efforts. CSX's statement that the railroads are in the best position to identify service problems is only partially true. It is necessary first to observe the failure, and recognize it. It is well to remember that for months while UP was experiencing operational delays they were reluctant to acknowledge that a problem existed. The problems multiplied and spread to impact the UP system, connecting roads, and customers.
- **Comment:** Williams believes that developing the Service Assurance Plan (SAP) is only part of the solution. The review and analysis of outside parties such as the Advisory Council and the Board's own staff are an integral part of averting a repeat of the past service failures. The consequences would be catastrophic if the UP/SP situation were to occur in a transcontinental merger.

The railroads viewed operational benchmarks as flexible and subject to redefinition with each merger.

- **Comment:** As Williams stated previously in its filings in this proceeding, pre-merger benchmarks are a critical element and an early indicator of potential service failures. While their definition may be flexible to some degree, basic measurements apply generally to operations. For example, dwell time for all major classification and interchange yards should be computed in a pre-merger environment as well as the transit time and/or train speed over main line traffic corridors that connect major transportation centers. The types of data collected in the UP/SP monitoring process offer a good starting point. Failure to collect specific data in a pre-merger operating environment causes much of its value to be lost.

#### **Compensation for Shippers**

With regard to compensation to shippers for service related failures, UP, NS, and BNSF offered comments. UP's position is that negotiating service agreements can play a useful role in protecting shippers against service failures.

NS states that the proposal to have the Board administer claims proceedings should be rejected. They further state that shippers can use the normal venues, such as the courts, to seek redress.

BNSF takes the position that the procedures for resolving disputes should be based on the formulation proposed by DOT. The remedies in this proposal include access to alternate transportation, rate discounts or recovery of losses. According to BNSF, these should be developed specifically within the individual merger.

- **Comment:** UP's suggestion that the compensation issue can be worked out in service agreements would be correct if the railroads would guarantee service standards in their service contracts. However, in contract negotiations the railroads are often reluctant to include meaningful service guarantees coupled with monetary penalties. The idea is good in theory but wanting in practice. In addition, shipments moving under tariff rates would not be afforded any protection.
- **Comment:** The BNSF proposal, based on the DOT concept, is also a good procedure if it were practical. Access to alternate transportation can have two applications, (1) intramodal and (2) intermodal. Access to another railroad is not always possible since many shippers are only served by one railroad and the mechanics of getting another railroad to the shippers facility is often not feasible. As for intermodal, the availability of this option depends on whether the shipper had loading facilities for the alternative mode and whether or not the receiver has facilities for handling the alternative transportation mode. We see certainty of damage paired with faint possibility of remedy.
- **Comment:** Compensation for losses is an issue that Williams addressed in its previous statements in this proceeding. The NS remedy with rail shippers using the courts to seek damages basically says the status quo is adequate. We, and many others, see it differently. The Board is attempting to make the revised merger regulations as comprehensive as possible with regard to the key issues. Financial damage to a rail user resulting from merger related service failures is a key issue. It can be and should be remedied within the regulations that govern the merger process.

#### **V. The Board Should Not Only Protect Competition, It Should Enhance It.**

The STB now recognizes that mergers must go beyond not threatening competition, they should enhance it as well. As noted earlier, the STB general policy (Sec. 1180.1) states that the STB will not favor consolidations unless there are substantial and demonstrable public benefits that cannot otherwise be achieved. The Board also appears to acknowledge that the most likely effect of a merger is the exact opposite, i.e. to reduce competition. Williams and the other participants in this proceeding have offered simple and effective remedies for this and other serious problems surrounding rail mergers.

### **Preserving Competition**

We recommend a strong implementation of the Board's pro-competitive policy: an explicit requirement for the applicants to identify with specificity each and every major instance of reduced competition, with a concomitant requirement to propose a specific remedy for each such situation. In this matter, individual shippers will be guaranteed protection from the loss of competitive alternatives that inevitably flow from the merger of Class I railroads. This provision will also force the railroads to develop creative solutions to the anti-competitive aspects of their consolidations.

While the railroads should be required to provide competitive solutions they should not be the only ones to do so. Williams submits that shippers are far more sensitive to the anti-competitive impacts of mergers than are the applicant railroads. Certainly, they have more incentive to resolve those impacts in ways that not only preserve, but also enhance competition. For this reason, Williams proposes that shippers, Class II and III railroads, the recommended Advisory Panel and other affected parties should be afforded equal status with the applicants when it comes to identifying competitive harms and recommending strategies to ameliorate them. This provision should be written into the rules, not just assumed. The STB should mandate consideration of that input by requiring a revised applicant railroad mitigation plan, reflecting shipper and non-applicant input.

### **Enhancing Competition**

While the Board's proposed rules require the applicant railroads to propose strategies for enhancing competition, these proposals will necessarily be constrained by the fact that only the merging systems can offer the concessions that might increase shipper choice. The merging railroads have no power to recommend solutions that would affect non-merging lines, other than to permit them greater access to their own customers. While such proposals may enhance competition, they are unlikely to occur since they result in the merging railroads offering all the concessions, and the non-merging lines offering none.

For this reason, Williams recommends that the Board convene independent inquiries when it examines the next merger to consider industry-wide reforms that would enhance competition broadly, not just within the context of the merging railroads. These reforms would deal with rights of access, reciprocal switching zones, competitive rate plans, and the rights of shippers to appeal against unreasonable rates and terms of service.

Williams Energy Services and many other respondents have recommended limited open access procedures for enhancing competition such as reciprocal switching, "interswitching," shared asset areas, competitive line rates, haulage and trackage rights, and other pro-competitive measures.

Another enhancement to competition would be for the Board to adopt a more pro-competition policy toward bottleneck rates. To date, the Board has imposed insuperable obstacles to shippers seeking relief from confiscatory rates for route

segments where they are totally captive to a single carrier. A change in Board policy to acknowledge shipper grievances would be a major improvement in the effectiveness of the competitive rail market. Such change coincides with a broad policy shift toward greater competitiveness and shipper empowerment.

Williams Energy Services, and many other respondents, have called for permitting shippers to challenge bottleneck rates, regardless of the makeup of the through rate. It is clearly advisable to simplify this process by requiring that the rate for any portion of the move be open to challenge on its own merits.

The simplified rate reasonableness challenge could also be extended to small shipper maximum rate cases. The Advisory Panel can assist in working up the procedures for simplified and more accessible procedures. And those simplified procedures can also make it less expensive to challenge rates. Currently, the cost of a rate reasonableness test is itself unreasonable and a major impediment to regulatory access.

#### **Discussion of Alternative Views**

Preserving and enhancing competition is, as might be expected, a polarizing issue for railroads and rail users. CSX, UP, NS, BNSF, CP, and CN all take the position that enhancing competition in situations that are not related to the merger application under review is wrong. The railroads have characterized enhancing competition as, reregulation, disguised open access, and a lead-in to a return to the inefficiencies and other problems that plagued the industry pre-Staggers Act.

Additionally, CSX and BNSF described as vague the treatment of this issue in the Board's proposed regulations. BNSF even added that they "lacked standards". In further justifying the exclusion of non-merger related competitive enhancements both CSX and UP stated that this approach conflicts with the merger policy employed by the Board and the ICC in past mergers. CSX stretches the record to the breaking point in stating that, "...requiring 'unrelated competitive enhancements' has garnered essentially no support among commenting shippers..."

- **Comment:** Characterizing the Board's inclusion of the concept of enhanced competition as reregulation, a return to the pre-Staggers Act inefficient railroad industry, and a disguise for open access can only be termed as scare tactics. The argument that this was not the policy embraced by the ICC or the Board in past mergers in part merely reflects the change in thinking on the agency's part regarding the competitive situation that currently faces users of rail service. That change was prompted by serious erosion of competitive alternatives in recent years.
- **Comment:** The railroads surely recognize that for years the ICC/STB merger policy has required balancing of the public interest and the railroad's corporate interest. The current lack of rail alternatives is in large part the direct result of past mergers. This lack of rail alternatives further suggests that the ICC/STB balancing of interests

tilted too far against the public interest. This proceeding is intended to correct that imbalance. Simply put, the competition issue was not dealt with in a manner that recognized the monopoly power that would accumulate with successive mergers.

- **Comment:** The statement by CSX that the concept of competitive enhancements had no support among shippers misstates and misrepresents the record, especially the extensive shipper filings. The CSX claim that shippers are not in favor of enhancing rail competition is blatantly incorrect. As pointed out by BNSF, the inclusion of competitive enhancements in the proposed regulations is vague and lacks standards. While some shippers may have a problem with this issue as it is currently included in the regulations, there is virtually no shipper opposition to the concept of enhanced competition. Some shippers, like Williams, proposed several proven procedures that can be used to enhance rail competition and noted that the resulting open access is to be limited in scope and application. The Board must supply specifics as to the framework under which this concept will be put into action. CSX's claims notwithstanding, enhancing rail competition has wide and solid shipper support.

Another aspect of the enhancement of competition relates to the issue of bottleneck rates. CSX, UP and NS offered comments on this issue. CSX proposes that the Board continue to limit the bottleneck exception to situations where there are existing contracts, otherwise it is characterized as reregulation. UP suggests that the merging railroads should make available separately challengeable bottleneck rates between exclusively served facilities on their system and the predominant pre-merger gateway. NS agrees with the Board's proposed rules which preserve the requirement to enter into contracts on one segment of the movement in order to gain relief for the remainder of the movement.

- **Comment:** Williams reaffirms its position that any portion of the rate should be open to challenge and should stand on its own merits. The UP railroad also did not support requiring the inclusion of the contract provision as a pre-condition to challenge bottleneck rates. While Williams applauds UP's approach it is limited to pre-merger predominant gateways. Broader application is required.

The final issue for discussion in this section is gateways. The railroads appear to be fearful that some parties are asking for a return of the DTI conditions with regard to gateways. CSX, UP, NS and BNSF all commented on limiting the retention of gateways in a post-merger environment to those they characterize as efficient, economic, major or important.

- **Comment:** Williams agrees that only major gateways that are currently being used in the movement of rail transportation should be considered in satisfying this requirement of the merger regulations. Williams does not advocate a return to the DTI conditions regarding the gateway issue in merger proceedings. Opening gateways that meet the railroad criteria: efficient, economic, major or important

gateways; will enhance the efficiency of national rail transportation and should be required by the Board.

#### **D. Conclusion**

The remedy is clear. The STB should require specific actions by the railroads centered on rigorous pre-merger testing and step-wise integration of systems within a 3 phased merger approval process. An Advisory Panel responsive to the Secretary of Transportation and empowered to deal with specific technical areas should be created to assist during the merger process.

The four key areas identified by Williams Energy Services are:

- **The Critical Need for Enhanced Competition**
- **Open Gateways and Limited Open Access**
- **Challengeable Bottleneck Rates**
- **Implementation Plan and Merger Oversight**

In each of these areas the need and the remedy are clear. The numerous respondents supporting changes similar to those recommended by Williams reinforce the clarity of both the need and the remedies. Exhibit A summarizes the widespread support for change in these four key areas.

The remedies presented by Williams Energy Services can help reverse the adverse rail performance trends and should be adopted by the Board.

**In summary the recommended initiatives include:**

- **Actions that implement the STB decision to enhance competition**
- **Adoption of a 3-phased merger review and approval process**
- **Procedures to prevent and recover economic losses caused by service failures**
- **A stronger rail merger implementation and oversight role for the Secretary of Transportation, including an empowered Advisory Panel reporting to the Secretary of Transportation**

**Exhibit A: Summary of Recommendations of Other Parties<sup>4</sup>**

**• Open Gateways**

The following parties agreed with key elements of our **Open Gateways** proposal:

Canadian Pulp & Paper  
CMA  
CSX  
• only applies this principle to "traditional" gateways  
Dow  
DuPont  
Glass Producers Transportation Council  
NITL  
PPG  
PPL Montana  
Proctor & Gamble  
Shell  
Society of Plastics Industry  
UP  
• only applies this principle to "traditional" gateways  
USDA  
• also discusses opening previously closed gateways  
USDOT

**• Competitive Access**

The following parties agreed with key elements of our **Competitive Access** proposal:

Alliance for Rail Competition  
American Shortline and Regional Railroads  
Canadian Pulp & Paper  
Canadian Resource Shippers Corp.  
CMA/APC  
Consumers United for Rail Equity  
Dow  
DuPont  
Farmrail  
Glass Producers Transportation Council  
MRL  
MRL, I&MRL  
National Association of Port Authorities  
NITL  
Ohio Rail Development Commission  
Ports of Seattle, Tacoma, Everett  
PPG  
PPL Montana  
Proctor & Gamble  
Shell  
Society of Plastics Industry  
USDA  
USDOT  
Western Coal Traffic League  
Weyerhaeuser

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<sup>4</sup> Reflects filings made through November 17.

• **Bottleneck Rates**

The following parties agreed with key elements of our

**Revision of Bottleneck Rates**  
proposal:

Alliant Energy Corporation  
Canadian Pulp & Paper  
CMA/APC  
Consumers Energy Company  
Consumers United For Rail  
Equity  
DOW  
DuPont  
Glass Producers Transportation  
Council  
NITL  
Ohio Rail Development  
Commission  
PPG  
PPL Montana  
Procter & Gamble  
Society of Plastics Industry  
UP  
USDOT  
Western Coal Traffic League

• **Implementation Plan**

The following parties agreed with key elements of our proposal calling for a  
**Detailed Implementation Plan with  
Merger Oversight Mechanisms:**

Amtrak  
California Attorney General  
California Public Utilities  
Commission  
Canadian Pulp & Paper  
CMA/APC  
CSX  
• lacks mention of benchmarks  
and real-time simulation  
DME  
DuPont  
Finger Lakes Railway Corp.  
GM  
Iowa DOT  
National Mining Association  
NITL  
Port Authority of NY & NJ  
PPG  
Society of Plastics Industry  
State of NY  
UP  
US Clay Producers  
USDOT

**Tom O'Connor:**

**Experience**

**Snavely King Majoros O'Connor & Lee,**

**Vice President (1988-Present)**

Mr. O'Connor has more than twenty-five years experience in the transportation industry. His experience includes key and increasingly responsible management and policy positions with government agencies and private industry.

Mr. O'Connor, in recent years has conducted analyses for the Government of Canada used to shape policy for freight transportation transport policy. He also has developed the Master Plan for Management Information Systems and computer facilities to measure, manage and monitor both rail freight and rail passenger transportation for the Bulgarian State Railways, in Bulgaria and the Balkan Peninsula. He has created and managed numerous computerized transport management and regulatory systems and is a widely recognized expert on costing and economics.

Mr. O'Connor has analyzed more than 45 rail merger scenarios and cases. He has provided expert testimony before state and federal courts and commissions in the U.S. and Canada on economic and policy issues. He has also testified as an expert on computerized transportation analytical systems, rail operations, anti trust issues and transportation costing. Mr. O'Connor also has served as an impartial and expert monitor of data and processes at issue in litigation on transportation.

Within the litigation arena, Mr. O'Connor has also conducted management audits of railroads, focused on identifying the cause and effect relationships underlying claimed cost incidence. The management audits were directed toward testing the cost basis of bills submitted by major railroads.

**DNS Associates Inc.,**  
**Vice President (1982 - 1988)**

Mr. O'Connor directed and participated in numerous projects including merger analyses, transportation infrastructure analyses, plant and network rationalization and feasibility studies. He designed and implemented mainframe and microcomputerized systems for analyzing rail,

truck and barge logistics. The computerized cost systems Mr. O'Connor created are in widespread use throughout the United States and Canada.

Mr. O'Connor also advised the U.S. Rail Accounting Principles Board on the costing aspects of regulatory reform policies. He also provided expert testimony on computerized data bases and cost systems and related rail cost issues before the Interstate Commerce Commission.

**Association of American Railroads,**  
**Assistant Vice President, Economics**  
**(1979 - 1982)**

Mr. O'Connor designed and managed major economic analysis projects. He helped formulate industry economic policy positions culminating in the Staggers Rail Act of 1980. He submitted expert testimony on behalf of the railroad industry in numerous cases before the Interstate Commerce Commission and state regulatory commissions. He also appeared regularly in national forums on economic issues.

Mr. O'Connor directed the most significant computerized industry Costing System project in 40 years, URCS, the cost system now used by all major US railroads. He also conducted industry seminars on URCS and related economic issues. Mr. O'Connor also testified before the Interstate Commerce Commission on the design and application of this pathbreaking rail cost system since adopted by the Commission and the rail industry.

He also directed development and installation of a commercial computerized economic and market analysis system now used by virtually all major US railroads.

**Consolidated Rail Corporation,**  
**Assistant Director, Cost & Economics**  
**(1977 - 1979)**

Mr. O'Connor was responsible for all Conrail management and regulatory cost analyses in both freight and passenger areas. He testified before the ICC on the development of subsidy standards now widely used in the US railroad industry. He also finalized the design, and implemented and managed Contribution Simulator and Calculator (COSAC), a computerized internal management economic

analysis system at Conrail. The COSAC system uses specific management accounting data to develop economic costs. COSAC replaced earlier systems and was used to guide virtually all transportation management decisions.

Mr. O'Connor also participated in cost allocation negotiations between Amtrak and Conrail on cost sharing of joint facilities on the Northeast corridor. He initiated and directed profit maximization and plant rationalization programs. He also designed and implemented computerization and improvement of a wide range of economic and cost analysis systems used to manage this multi-billion dollar corporation.

**R.L. Banks & Associates Inc.,  
Consultant (1976 - 1977)**

Mr. O'Connor conducted and directed numerous transportation-related projects in the U.S. and Canada ranging from national logistics analyses to site-specific studies. He specialized in costing systems and appeared as an expert witness on such systems in a precedent setting proceeding before a Canadian Crown Commission.

**U.S. Railway Association,  
Manager, Local Rail Service Planning  
(1974 - 1976)**

Mr. O'Connor developed, computerized and implemented the light density lines cost analysis system, which defined Conrail. He served as liaison with congressional staffs and shipper groups, as well as federal, state, and local governments, and planning agencies. The system he created was a major element in the design and implementation of the streamlined Midwest-Northeast regional rail system. Mr. O'Connor subsequently appeared as an expert witness to present and defend the operation of the USRA costing system.

**Interstate Commerce Commission,  
Economist, (1973-1974)**

Mr. O'Connor served as a staff economist and authored a report analyzing industry investment patterns and ICC regulatory policy, including ICC use of cost evidence.

**Education**

- University of Massachusetts, Amherst, B.A. Economics
- University of Wisconsin, Graduate Course Work, Economics
- University of Delaware, Graduate Course Work, Business Management
- The American University, Graduate Course Work, Computer Science

**Professional Organizations**

- Transportation Research Board
  - Former Chairman Surface Freight Transportation Regulation Committee
- Transportation Research Forum
  - Former President of the Cost Analysis Chapter
- National Defense Transportation Association
  - Member of Board of Directors, National Capital Chapter
- Phi Beta Kappa academic honors society
- Phi Kappa Phi academic honors society

**Military**

U.S. Army; Sergeant, Combat Engineers

**Security Clearance**

Secret

**SK Snavely King Majoros O'Connor & Lee**

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**Economic and Management Consultants**

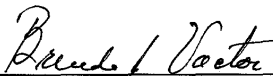
**VERIFICATION**

I, Tom O'Connor, declare under penalty of perjury that the foregoing statement is true and correct and was prepared by me or at my direction. Further, I certify that I am qualified and authorized to file this statement. Executed on January 11, 2001.



Tom O'Connor

Subscribed and sworn to before me this 8th day of January 2001 in the District of Columbia.



Notary Public

My Commission expires 6/30/2003

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**Notice of Service**

Copies of this Verified Statement and the accompanying Comments were served by first class mail on the Parties of Record for Ex Parte 582 (Sub No.-1).



Tom O'Connor

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January 11, 2001

Ex Parte No. 582 (Sub-No. 1)